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Supreme Court of the United States

OCTOBER TERM 1964

No. 1018/1964

A. G. V. ASSOCIATES, INC.,

Petitioners,

against

JEREMIAH F. CROSS, Trustee of 716 Third Avenue Holding Corp., Bankrupt,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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A. G. V. ASSOCIATES, INC.,

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RESPONDENT'S BRIEF

POINT ONE

No appeal lies to the Supreme Court from the order sought to be reviewed.

The order of the Circuit Court of Appeals for the Second Circuit reversed and remanded for a rehearing and further findings by the Referee in Bankruptcy. The Court held that the Referee had failed to make the necessary findings of fact on the "key issue" of the case (A-8).* The order of remand is not a final order from which an appeal could lie.

Slaker v. *O'Connor*, 278 U. S. 188, 189; 49 S. Ct. 158, 159; 73 L. Ed. 258;

City of Chicago v. *Atchison*, 375 U. S. 77; 78 S. Ct. 1063;

South Carolina Electric & Gas Co. v. *Fleming*, 351 U. S. 901; 76 S. Ct. 692; 100 L. Ed. 1439.

* References are to pages of Petitioner's Appendix.

POINT TWO

A. The Referee failed to make the necessary findings of fact for his holding that no security transaction was intended.

B. The Circuit Court of Appeals properly remanded for further findings.

The gist of petitioner's argument is that

> "The factual findings of the trier of facts, especially where affirmed by the District Court, must be upheld." (p. 6 of petitioner's brief)

Thus, petitioner suggests that the Circuit Court of Appeals has in some way *upset* or modified the findings of the Referee in remanding the cause. However, the Court of Appeals has not disturbed any of the findings of the Referee but found that the Referee failed to make

> "findings on the basic facts essential to a determination of the issue of whether or not this was a mortgage transaction." (A-8)

The Court held that the Referee

> "considered the absence of an express written statement of a debt completely determinative and that it was unnecessary to deliberate on the evidence on the key issue of the case . . . " (A-8)

and that, therefore, the Referee labored under a misunderstanding of the law. The Court of Appeals had a duty under these circumstances to remand for further findings. As this Court said in *Guzman* v. *Pichardo*, 369 U. S. 698, 82 S. Ct. 1095, the very case relied on by petitioner:

> "If we were convinced, as was the Court of Appeals, that the trial court's action was colored by a misunder-

standing of such legal principles, we would have to remand, as the Court of Appeals should have, for further findings by the trial court on the credibility of the owner's witness (Citations)."

In this case the Court of Appeals properly remanded for further findings.

CONCLUSION

The petition for a writ of certiorari should be dismissed, in the alternative, denied for lack of merit.

Respectfully submitted,

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